MALAYSIAN REPORTS

TAN CHEW MAN v. PUBLIC PROSECUTOR

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) July 1, 1977]

[Kuala Lumpur — Federal Court Criminal Appeal No. 33 of 1976]

Criminal Law and Procedure — Charge of exhibiting a firearm — Whether section 34, Penal Code can be invoked to punish person other than one who exhibited firearm — Whether such person can be charged jointly under sections 392 and 397 of the Penal Code.

Penal Code, ss. 34, 392, 394 and 397 — Exhibiting firearm.

The appellant and another person were originally charged, that in furtherance of their common intention at the time of committing a scheduled offence, did exhibit a revolver, an offence punishable under section 4 of the Firearms (Increased Penalties) Act 1971, read together with section 34 of the Penal Code. The learned trial judge ruled that section 34 of the Penal Code could not be invoked to punish a person other than the one who exhibited the firearm. He amended the charge to one "that in furtherance of the common intention" they committed robbery and "at the time of committing the robbery one of you, namely Tang Chew Nam was armed with a deadly weapon" an offence punishable under sections 392 and 397 of the Penal Code. The appellant appealed.

Held: (1) the learned trial judge was right in ruling that section 34 of the Penal Code could not be invoked to punish a person other than the one who exhibited the firearm;

(2) section 397 of the Penal Code does not create any substantive offence and is merely a rider to section 394. Its provisions can be invoked only against an offender who actually acts in contravention of that section and against no other person, no matter how much that person may have acted in concert and in furtherance of the common intention to commit robbery;

(3) the conviction and sentence on the first charge must be set aside but the conviction and sentence of the appellant and his co-accused on other charges of offences under sections 4 and 9 respectively of the Firearms (Increased Penalties) Act, 1977 were confirmed.

Cases referred to:-

(1) *Subramaniam & Anor.* v. *Public Prosecutor* [1967] 1 M.L.J. 76, 77.

(2) *Lee Wai Kam* v. *Public Prosecutor* [1976] 2 M.L.J. 19.

(3) *Rex* v. *Yeo Kim Watt* [1946] M.L.J. 155.

FEDERAL COURT.

K. Pasupathy for the appellant.

Faidz Mohamed Darus (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court): The appellant pleaded guilty to two charges, amended at the close of the prosecution case, by the learned judge, purportedly under section 158 of the Criminal Procedure Code, one, jointly with one Kow Lap Cheng, the first accused in Seremban High Court Criminal Trial No. 1 of 1976, of robbery under sections 392 and 397, and at that time armed with a revolver, and the other, of an offence under section 4 of the Firearms (Increased Penalties) Act, 1971. The appellant was sentenced on the first charge to 6 years' imprisonment with effect from date of arrest (August 9, 1975) and three strokes of the rattan and on the second, to life imprisonment and six strokes of the rattan, the imprisonment to run concurrently with the first charge.

The other accused, who has not appealed, was sentenced on the joint charge with appellant to six years' imprisonment with effect from date of committal (February 24, 1976) and on a charge under section 9 of the Firearms (Increased Penalties) Act, 1971 of consorting with the appellant, to eight years' imprisonment (concurrent) and six strokes of the rattan.

The appellant and his co-accused were originally charged that, in furtherance of their common intention at the time of committing a scheduled offence, did exhibit a revolver, an offence punishable under section 4 of the Firearms (Increased Penalties) Act, 1971 read together with section 34 of the Penal Code.

We respectfully agree with the learned judge when he ruled that section 34 of the Penal Code cannot be invoked to punish a person other than the one who exhibited the firearm. This seems clear from section 4 which enacts: —

"4. *Any person who* at the time of his committing or attempting to commit or abetting the commission of a scheduled offence or robbery *exhibits a firearm* in a manner likely to put any person in fear of death or hurt shall be punished with imprisonment for life and with whipping with not less than six strokes." (Emphasis mine).

For the same reasons, we think that Ajaib Singh J. (though *obiter*) was absolutely correct, when he said in *Subramaniam & Anor.* v. *Public Prosecutor*[1] (at page 77): —

"There is another aspect of this case which remains to be considered, although it was not discussed during the hearing of the appeal before me. The appellants were, as stated earlier, charged under sections 392 and 397 read with section 34 of the Penal Code. Section 397 provides for the imposition of an additional punishment by way of whipping if, at the time of committing or attempting to commit the substantive offence of robbery the offender is armed with or uses a deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person. However, *whipping may be ordered* by the court *only against the particular offender* who is thus armed or causes grievous hurt and not against a person who associates with such armed offender in the commission of the offence of robbery but is himself not armed with a deadly weapon and does not himself cause grievous hurt or attempt(s) to cause death or grievous hurt to any person. *The joint liability* of two or more persons in the doing of a criminal act *under section 34* of the Penal Code *does not extend to section 397* of the Code. Section 397 provides for the imposition of an additional sentence and *its provisions are to be invoked only against an offender who actually acts in contravention of that section* and to no other person no matter how much that person may have acted in concert and in furtherance of the common intention to commit robbery." (Emphasis mine).

Having said that, he apparently resiled when he amended the charge at the close of the prosecution case against the appellant and his co-accused to one as follows: —

"That you jointly on 8th August 1975 at about 12.00 noon at No. 5 Jalan Tambah Tin, Pertang, in the District of Jelebu, in the State of Negri Sembilan, in furtherance of the common intention of you both, robbed one Siow Yen Fui of $13,000 in cash and at the time of committing the said robbery one of you, namely, Tang Chew Man, was armed with a deadly weapon, to wit, a revolver, and thereby committed an offence punishable under sections 392 and 397 of the Penal Code."

We do not think by using the word "jointly" and omitting "read with section 34" in the amended charge a conviction of the co-accused who was unarmed, on a charge under sections 392 and 397 can be sustained.

No doubt, Ajaib Singh J. allowed himself to be influenced by *Lee Wai Kam* v. *Public Prosecutor*[2] where Abdoolcader J. held that "there was no reason why section 34 of the Penal Code should not apply to section 392 read together with section 397 of the Penal Code to the same extent as it applies to other offences ... as the matter has been conclusively determined by the Court of Criminal Appeal of Singapore in *Rex* v. *Yeo Kim Watt*."[3] That judgment received adverse editorial comment at pp. lxxxvii to lxxxix of the same volume ([1946] M.L.J.). We do not agree with that judgment for the reasons given by the learned editor. In that case and Lee Wai Kam, the error was in the view taken that section 397 read with section 392 creates a separate and distinct offence. We would adopt the comments of the learned editor which we now reproduce *seriatim*: —

"The point at issue is however whether section 397 constitutes a separate offence in itself. We respectfully submit that it does not and that in fact section 397 only provides for an additional punishment for the person or persons who at the time of committing or attempting to commit robbery are armed with or use deadly weapons or cause grievous hurt or attempts to cause death or grievous hurt" and concluded:—

"We feel that the Court of Criminal Appeal should have set a higher value to the present unanimous opinion of the courts in India that section 34 of the Indian Penal Code has no application to section 397 or 398 of that Code."

(Our section 397 replaced the former sections *in pari materia* which provided for minimum terms to be imposed and prescribed that the punishment for robbery (under section 392) and attempted robbery (under section 393) for an offender armed with a deadly weapon shall be liability to whipping "*in addition to any other punishment* under any other section of the Code.").

As *Ratanlal* in The Law of Crimes (22nd Edition) at page 1024 says: —

"This section is merely a rider to section 394. It does not create any substantive offence."

We, therefore, allow the appeal of the appellant and set aside his conviction and sentence on the first charge. The co-accused was sentenced concurrently with his sentence on the second charge and no order need be made here in regard to his conviction and sentence on the first charge.

Upon the record we are satisfied that there was ample evidence on the charges against the appellant and his co-accused of offences under sections 4 and 9 respectively of the Firearms (Increased Penalties) Act, 1971. They have both pleaded guilty thereto. We therefore dismiss his appeal in respect of the second charge.

The judgment, to the extent as varied, stands.

Order accordingly.

Solicitors: *Pasupathy & Co.*

MOHAMED NOOR BIN AWANG v. MEK TOK BINTI MAT MIN

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Mohamed Zahir J.) June 6 and July 6, 1977]

[Kota Bharu — Federal Court Civil Appeal No. 158 of 1976]

Land Law — Jual Janji — Land redeemed by third person on agreement to transfer land when redeemed by original owner — Whether trust created in favour of original owner.

The plaintiff, the owner of certain land entered into a *jual janji* agreement with one Daud under which it was agreed that he could redeem it by the 5th March 1959. Before that date he agreed with the respondent that the respondent should redeem the land and hold it and that when the plaintiff wanted to redeem it, the respondent was to transfer the land to him. Subsequently the plaintiff wanted to redeem the land but the respondent refused to allow him to do so. The plaintiff sued the respondent for the return of the land but the learned judge without hearing any evidence dismissed the claim. On appeal by the personal representatives of the plaintiff (who had since died),

Held: (1) the claim in this case was founded not on the *jual janji* transaction with Daud but on another, the transaction between the plaintiff and the respondent, which according to the plaintiff gave rise to a trust in his favour;

(2) whether or not the plaintiff's personal representative could prove the trust was a matter of evidence and the dispute should therefore be allowed to go to trial.

FEDERAL COURT.

Datuk Wan Mustapha for the appellant.

Mahmood Adam for the respondent.

Suffian L.P. (delivering the judgment of the Court, read by Mohamed Zahir J.): We allowed this appeal and now give our reasons.

On March 5, 1956, the plaintiff entered into a *jual janji* transaction with one Daud bin Bulat ("Daud"). The land in question was transferred into Daud's name, it being agreed that the plaintiff could redeem it on March 5, 1959. The plaintiff did not redeem it by that date.

However before that date, the plaintiff had agreed with his nephew's wife, the defendant, that the defendant might redeem it from Daud on the plaintiff's behalf, whereupon she was to hold it on trust by way of mortgage for an unlimited period, and that when the plaintiff wanted to redeem it from the defendant, the defendant was to transfer the land back to the plaintiff. In pursuance of this agreement the defendant after March 5, 1959, redeemed the land from Daud and the defendant became the registered owner. The plaintiff went off to live with his son in Pahang and several years later when he returned to Kelantan, he asked to redeem the land from the defendant; she however refused to allow it. The defendant says that she had bought the land from Daud in good faith.

The plaintiff sues the defendant, claiming a declaration among other things that the land had been transferred by Daud to the defendant as a security and that the mortgage is still subsisting.

The learned judge without hearing any evidence dismissed the plaintiff's claim, on the ground that the plaintiff had no cause of action. Clearly the judge was under the impression that the plaintiff's claim was founded on the transaction between the plaintiff and